No. 80-2078

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

DAMES & MOORE, a Partnership, *Petitioner*,

v.

DONALD T. REGAN, ET AL., *Respondents*.

On Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

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MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF AMERICAN BELL INTERNATIONAL INC. AMICUS CURIAE

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MOTION OF AMERICAN BELL INTERNATIONAL INC. FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND INTEREST OF THE AMICUS

American Bell International Inc. ("ABII") moves this Court for leave to file the within Brief Amicus Curiae pursuant to Rule 36.3 of the Rules of the Court. On June 15 1981, ABII filed a Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit Before Judgment (*American Bell International Inc. v. Islamic Republic of Iran, et al.*, No. 80-2111), and a Motion For Expedited Consideration And For Consolidation With *Dames & Moore v. Donald T. Regan, The*

Secretary of the Treasury of the United States of America, and the United States of America, No. 80-2078, *cert. granted,* June 11, 1981. Petitioner's brief on the merits in *Dames & Moore,* and, therefore, ABII's Brief Amicus Curiae is due today, June 19, 1981. ABII's Petition and Motion are still pending.

That ABII has an interest in the subject matter of *Dames & Moore* is obvious. It filed suit against Iran in the United States District Court for the District of Columbia for breach of contract, and it attached $69.6 million of Iran's remainder interest in the Foreign Military Sales Fund.[1]

What may be less obvious, however, are the differences between ABII's case and *Dames & Moore,* and it is the differences rather than the similarities that prompt ABII to file a Brief Amicus Curiae.

In contrast to petitioner in *Dames & Moore,* ABII makes no assault on the President's authority to settle international claims between U.S. nationals and foreign states, nor does ABII challenge the President's authority to nullify attachments and terminate litigation when he provides meaningful alternative relief for U.S. claimants.

For most United States claimants whose attachments have been nullified, the President has provided meaningful alternative relief in the form of access to the Iran-U.S. Claims Tribunal established by agreement between the United States and Iran. That Tribunal has jurisdiction generally to decide commercial claims of U.S. nationals against Iran. It does not have jurisdiction over claims arising under a "binding" contract providing that

[1]On June 11, 1981, the district court ordered that ABII's attachment be vacated on the ground that its case was controlled by *American International Group, Inc. v. Islamic Republic of Iran* (D.C. Cir. June 5, 1981) (slip op.). The district court's order vacating ABII's attachment is currently stayed.

any disputes arising thereunder "shall be within the sole jurisdiction of the competent Iranian courts . . . ." Pet. App. 103a.[2]

Many contracts in dispute between U.S. nationals and Iran have settlement provisions that do not mention the courts of Iran. As to these, there is no question of the Tribunal's jurisdiction. Many U.S. claimants have contracts providing for arbitration or a similar procedure prior to judicial resolution in the Iranian courts. Dames & Moore is an example. The United States takes the position that claims arising under these contracts can also be heard by the Tribunal. United States Statement of Interest, p. 25, filed February 26, 1981, in district courts in which Iran cases were pending ("Statement of Interest").

ABII's contract, however, and the contracts of several other claimants, provide for the settlement of disputes solely by reference to the competent courts of Iran. It can be argued that such contracts are no longer "binding" because of changed circumstances, and should not, therefore, preclude jurisdiction by the Tribunal. The United States will support this argument, *id.* at 25, but no one can predict what the Tribunal will do with respect to jurisdiction. In light of the forum selection language of its contracts, ABII must reasonably assume at this point, and we believe the Court should as well, that the Tribunal lacks jurisdiction over its claims against Iran.

In the conduct of foreign relations, the President has many times settled claims against foreign states by remitting U.S. claimants to international arbitration or by lump sum settlements. The President's exercise of this power, however, is clearly circumscribed by constitutional provisions, *e.g., Reid v. Covert,* 354 U.S. 1 (1957), as well as by

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[2]Even though ABII is an amicus, for convenience it cites to its Appendix to Petition for Writ of Certiorari Before Judgment.

congressional action within the "zone of twilight in which [the President] and Congress have concurrent authority". *Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579, 636 (1952) (Jackson, J., concurring). As to claimants remitted to the Iran-U.S. Claims Tribunal the President may properly have exercised his statutory and inherent powers. As to claimants likely to be excluded from the Tribunal, however, he has exceeded his authority.

ABII files this Brief Amicus Curiae to put the issue of presidential power in full perspective. We believe that this Court can and should distinguish between claimants who will have access to the Tribunal and those who in all likelihood will not. A holding by this Court that the President may nullify an attachment, transfer the attached property to Iran, and afford no alternative relief for the American creditor would have far more serious consequences than a more limited holding that conditions the President's emergency economic powers on the availability of alternative relief.

Respectfully submitted,

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TABLE OF CONTENTS

Page

Table of Authorities vii

Interest of Amicus 1

Summary of Argument 1

Argument 6

I. THE PRESIDENT IS NOT AUTHORIZED TO NULLIFY THE ATTACHMENT OF AN EXCLUDED CLAIMANT WITHOUT PROVIDING A MEANINGFUL ALTERNATIVE REMEDY 6

A. The International Emergency Economic Powers Act Does Not Authorize the President to Nullify Attachments When He Has Not Provided An Alternative Remedy 6

1. IEEPA was enacted to restrict the President's authority 6

2. The President's actions as to excluded claimants are inconsistent with the purposes of IEEPA and with precedents of this Court 7

3. IEEPA does not authorize the nullification of attachments when no alternative relief is provided 11

4. The Foreign Sovereign Immunities Act denies to the President authority to nullify attachments obtained pursuant thereto 13

B. The Hostage Release Act Does Not Authorize The President To Nullify Attachments 15

C. The President Lacks Inherent Constitutional Authority To Nullify Attachments Without Providing An Alternative Remedy 16

II. THE NULLIFICATION OF THE ATTACHMENTS OF EXCLUDED CLAIMANTS CONSTITUTES A TAKING IN VIOLATION OF THE FIFTH AMENDMENT 19

A. The Attachments Are A Property Interest 20

B. The Nullification Of The Attachments Of Excluded Claimants Constitutes An Unlawful Taking 24

TABLE OF AUTHORITIES

Cases	Page(s)
Agee v. Muskie, 629 F.2d 80 (D.C. Cir.), *cert. granted*, 101 S.Ct. 69 (1980)	16
American International Group, Inc. v. Islamic Republic of Iran, No. 80-1779 (D.C. Cir. June 5, 1981) (slip op.)	*passim*
Armstrong v. United States, 364 U.S. 40 (1960)	4, 20, 24
Arnett v. Kennedy, 416 U.S. 134 (1974)	21
Blagge v. Balch, 162 U.S. 439 (1896)	20
Board of Regents v. Roth, 408 U.S. 564 (1972)	21, 22
Brown v. J. P. Morgan & Co., 177 Misc. 626, 31 N.Y.S.2d 323 (Sup.Ct. 1941), *rev'd on other grounds*, 265 A.D. 631, 40 N.Y. S.2d 229 (1943), *aff'd* 295 N.Y. 867, 67 N.E.2d 263 (1946)	8
Charles T. Main International, Inc. v. Khuzestan Water & Power Authority, No. 80-1027 (1st Cir. May 22, 1981) (typescript opinion)	9, 11, 17
Cherokee Nation v. Southern Kansas R.R. Co., 135 U.S. 641 (1890)	24
Cities Service Co. v. McGrath, 342 U.S. 330 (1952)	5, 26, 27
Gray v. United States, 21 Ct. Cl. 340 (1886)	20
Guessefeldt v. McGrath, 342 U.S. 308 (1952)	2, 8

Hughes Aircraft Co. v. United States,
534 F.2d 889 (Ct. Cl. 1976) 25

In re Hoops,
3 B.R. 635 (D. Colo. 1980) 20

Louisville Joint Stock Land Bank
v. Radford, 295 U.S. 555 (1935) 20

Nielsen v. Secretary of Treasury,
424 F.2d 833 (D.C. Cir. 1970) 8

Orvis v. Brownell,
345 U.S. 183 (1953) ..... *passim*

Orvis v. McGrath,
198 F.2d 708 (2d. Cir.), *aff'd sub nom.*
Orvis v. Brownell, 345 U.S. 183 (1953) 9

Perry v. Sindermann,
408 U.S. 593 (1972) 21-22

Posadas v. National City Bank,
296 U.S. 497 (1936) 15

Propper v. Clark,
337 U.S. 472 (1949) 8

Redpath v. Kissinger,
415 F.Supp. 566 (W.D. Tex.), *aff'd* 545 F.2d
167 (5th Cir. 1976) 16

Regional Rail Reorganization Act Cases,
419 U.S. 102 (1974) 5, 24, 26

Reid v. Covert,
354 U.S. 1 (1957) 4, 19

Rich v. Naviera Vacuba, S.A.,
197 F. Supp. 710 (E.D. Va.),
aff'd 295 F.2d 24 (4th Cir. 1961) 11, 18

Richardson v. Simon,
560 F.2d 500 (2d Cir. 1977), *appeal dismissed, Richardson v. Blumenthal*,
435 U.S. 939 (1978) 8

Seery v. United States,
127 F. Supp. 601 (Ct. Cl. 1955) 19

Silver v. New York Stock Exchange,
373 U.S. 341 (1963) 15

United States v. Belmont,
301 U.S. 324 (1937) 3, 17

United States v. Fuller,
409 U.S. 488 (1973) 5, 23

United States v. Guy W. Capps, Inc.
204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds*, 348 U.S. 296 (1955) 19

United States v. Pink,
315 U.S. 203 (1942) 3, 17-18

United States v. The Schooner Peggy,
5 U.S. (1 Cranch) 103 (1801) 19-20

Victory Transport, Inc. v. Comisaria General,
336 F.2d 354 (2d Cir.), *cert. denied*,
381 U.S. 934 (1965) 11, 18

Ware v. Hylton,
3 U.S. (3 Dall.) 199 (1796) 4, 19

Worthy v. Herter,
270 F.2d 905 (D.C. Cir.), *cert. denied*,
361 U.S. 918 (1959) 15-16

Youngstown Sheet & Tube Co. v. Sawyer,
343 U.S. 579 (1952) 15, 18

Zemel v. Rusk,
381 U.S. 1 (1965) 16

Zittman v. McGrath,
341 U.S. 446 (1951) 2, 10, 11, 12, 21

Zittman v. McGrath,
341 U.S. 471 (1951) 8

Constitutional Provisions, Statutes, Regulations, and Executive Agreements

Constitution of the United States
Amendment 5 ..... 24, 25

International Emergency Economic Powers Act,
50 U.S.C. §§ 1701-1706 (Supp. 1980) ..... *passim*

Trading With the Enemy Act, 50 U.S.C. app. §§ 1-44
(1968 & Supp. 1980) ..... *passim*

Foreign Sovereign Immunities Act of 1976,
28 U.S.C. §§ 1330, 1602-1611 (1976) ..... *passim*

Arms Export Control Act,
22 U.S.C. § 2751 (1979) 23

22 U.S.C. § 1732 15

28 U.S.C. § 1502 ..... 5, 25

D.C. Code Ann. § 16-501 (1973) 13

31 C.F.R. § 535.805
(46 Fed. Reg. 66834) 20

Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims By the Government of the United States of America and the Government of the Islamic Republic of Iran 25

Miscellaneous

46 Cong. Globe, 40th Cong. 2d. Sess., 1796, 4207, 4211, 4212, 4232 (1868) 16

L. Henkin, Foreign Affairs and the Constitution (1972) 18

H.R. Rep. No. 95-459, 95th Cong., 1st Sess. (1977) 6

H.R. Rep. No. 94-1487, 94th Cong., 2d. Sess. (1976), *reprinted in* 1976 U.S. Code Cong. & Ad. News. 6604 ..... 13-14, 15

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BRIEF OF AMERICAN BELL INTERNATIONAL INC. AMICUS CURIAE

INTEREST OF AMICUS CURIAE

The interest of American Bell International Inc. ("ABII") as amicus curiae is set forth in the Motion of ABII for Leave to File Brief Amicus Curiae, pp. i-iv, *supra.*

SUMMARY OF ARGUMENT

A. The International Emergency Economic Powers Act does not authorize the President to nullify attachments when he provides no alternative relief for U.S. claimants. That Act was enacted in 1977 to curtail the economic powers previously exercisable by the President in peacetime under the Trading With the Enemy Act. In IEEPA Congress reenacted the President's TWEA power

to freeze assets but denied to the President the power to vest assets in peacetime. Both Acts empower the President to protect the interests of U.S. claimants by preserving foreign assets to satisfy claims, power used in this case for the benefit of many, but not all claimants.

As to claimants who are unlikely to be able to present claims to the Tribunal – the excluded claimants – the President has invoked his IEEPA powers to nullify attachments, transfer the attached assets to Iran, and leave claimants with no means of enforcing a claim against Iran. That result is contrary to the precedents of this Court. *Orvis v. Brownell*, 345 U.S. 183 (1953), and *Zittman v. McGrath*, 341 U.S. 446 (1951), hold that an attachment obtained during a freeze is nonetheless valid in determining relationships between the American creditor and the foreign debtor (Iran). *Zittman* holds that an Alien Property Custodian standing in the shoes of an enemy debtor cannot defeat an attachment even when he vests the debtor's interest in the property; *Orvis* permitted the Custodian to vest, free of an attachment. Neither case, however, would permit the result sought by the President in this case under the more limited powers of IEEPA.

The United States argues that the plain language of IEEPA authorizes the President to nullify attachments. This Court has counseled against the literal application of that language. *Guessefeldt v. McGrath*, 342 U.S. 301, 319 (1952). Moreover, the argument proves too much. The language of IEEPA is so broad that it would authorize virtually any presidential action during a national emergency with respect to foreign assets, even the power to vest which IEEPA specifically denies to the President. The scope of the President's power under IEEPA must be determined by reference to the purposes of that

legislation and of its predecessor, TWEA. Those Acts were designed to deny to a hostile foreign state the use of its assets, to preserve foreign assets for the benefit of United States creditors, and to insure an equitable distribution of such assets among creditors. When the President provides alternative remedies for United States claimants through an international claims program, in this case through the arbitration procedures of the Iran-U.S. Claims Tribunal, he acts consistently with the statutory objectives. When he nullifies the attachments of claimants who are excluded from the Tribunal, he exceeds his statutory authority.

The nullification of attachments by Presidential fiat is also inconsistent with the Foreign Sovereign Immunities Act, which vests in the courts responsibility for determining when foreign states are subject to suit and when their assets may be attached. It does not offend against the FSIA temporarily to prevent execution on an attachment by freezing assets. The President's actions here, however, permanently place foreign assets beyond the reach of U.S. claimants excluded from the Tribunal and thus have the same effect as a suggestion of immunity: the decision to insulate foreign assets from U.S. claimants is being taken for foreign policy rather than judicial reasons, and it is being made by the President rather than the courts. This contravenes the FSIA.

The President also has no inherent constitutional authority to nullify attachments, particularly in light of the FSIA. Neither *United States v. Belmont*, 301 U.S. 324 (1937), nor *United States v. Pink*, 315 U.S. 203 (1942), the cases relied on by the United States, authorizes the actions taken here; neither case involves the constitutional rights of U.S. nationals. The President has long exercised the authority to enter into claims settlement agreements with

foreign states, frequently through executive agreement. Whatever may be the extent of the President's inherent authority to affect judicial process when remitting U.S. claimants to alternative forums such as binding international arbitration, he cannot claim such authority as to claimants who will not have access to the alternative procedures agreed upon. Executive agreements entered into for foreign policy reasons may not defeat constitutional rights and cannot create presidential power. *Reid v. Covert*, 354 U.S. 1 (1957).

B. The nullification of the attachments of excluded claimants is also a taking in violation of the Fifth Amendment. The courts have long recognized a right to compensation when property is taken or sacrificed to achieve foreign policy objectives. *E.g., Ware v. Hylton*, 3 U.S. (3 Dall.) 199 (1796). The nullification of the attachments of excluded claimants is an unlawful taking for Fifth Amendment purposes because, first, the attachments constitute a property interest that was taken, and second, such claimants do not now have a reasonably certain prospect of obtaining compensation.

An attachment is a property interest within the meaning of the Fifth Amendment. *See, e.g., Armstrong v. United States*, 364 U.S. 40, 46 (1960). The Court of Appeals in *American International Group, Inc. v. Islamic Republic of Iran*, No. 80-1779 (D.C. Cir. June 5, 1981) (slip op.) ("*AIG*"), however, held that attachments of Iranian property obtained during the freeze were not property capable of being taken because the license permitting attachments was revocable; attaching claimants had no reasonable expectation that their attachments would remain valid. Claimants did however have a reasonable expectation, based on precedents of this Court and prior history, that their attachments would create valid property interests vis-

a-vis Iran. They also had the reasonable expectation that, if their attachments were defeated by further action of the President, they would nonetheless be given alternative relief against frozen Iranian assets.

It is also erroneous to analogize the nullification of the attachments to the revocation of property licenses issued by the United States with respect to public lands. *See, e.g., United States v. Fuller,* 409 U.S. 488 (1973). A license to graze on public land is essentially a leasehold interest issued by an owner entitled to exercise dominion over the leasehold. Attachments are creatures of state law. IEEPA permits the President to regulate attachments and other property interests for specific purposes. Claimants had no reason to expect that the President would extinguish their pre-existing rights to seek recovery from the attached foreign assets.

The Government's nullification of the attachments of excluded claimants constitutes a taking because they have no reasonable prospect of compensation. Access to the Iran-U.S. Claims Tribunal would constitute compensation for the taking of the attachment, but excluded claimants are unlikely to have such access. Because 28 U.S.C. § 1502 denies the Court of Claims jurisdiction of claims that arise from or are dependent on a treaty, that Court may not have jurisdiction of a claim for compensation. This Court can meet the Fifth Amendment claim by holding that 28 U.S.C. § 1502 will not bar Court of Claims jurisdiction, but that holding must be made now, not in the future. *Regional Rail Reorganization Act Cases,* 419 U.S. 102 (1974); *Cities Service Co. v. McGrath,* 342 U.S. 330 (1952).

ARGUMENT

I. THE PRESIDENT IS NOT AUTHORIZED TO NULLIFY THE ATTACHMENT OF AN EXCLUDED CLAIMANT WITHOUT PROVIDING A MEANINGFUL ALTERNATIVE REMEDY.

A. The International Emergency Economic Powers Act Does Not Authorize the President to Nullify Attachments When He Has Not Provided An Alternative Remedy.

1. IEEPA was enacted to restrict the President's authority.

This case calls upon the Court to define the extent of traditional presidential powers to freeze and regulate foreign assets in an international emergency in the light of expressed congressional dissatisfaction with the manner in which those powers have previously been exercised. It is a case of first impression.

Congress enacted IEEPA in 1977 specifically to curtail emergency powers previously exercisable in peacetime by the President under the Trading with the Enemy Act, 50 U.S.C. app. §§ 1-44 (1968 & Supp. 1980) ("TWEA"). Section 5(b) of TWEA had conferred on the President the powers, exercisable in wartime or during a national emergency, to freeze and to vest foreign assets. Congress believed that Section 5(b) had become "essentially an unlimited grant of authority for the President. . . ." H.R. Rep. No. 459, 95th Cong., 1st Sess. 7 (1977). IEEPA reenacts the freezing power of TWEA, but it tightens the definition and limits the duration of a declared national

emergency, 50 U.S.C. §§ 1701(b), 1706(b), and more important, it denies the President the power to vest in peacetime.

2. The President's actions as to excluded claimants are inconsistent with the purposes of IEEPA and with precedents of this Court.

IEEPA authorizes the President to:

> [I]nvestigate, regulate, direct and compel, nullify, void, prevent or prohibit, any acquisition, holding, withholding, use, transfer, withdrawal, transportation, importation or exportation of, or dealing in or exercising any right, power, or privilege with respect to, or transactions involving, any property in which any foreign country or national thereof has any interest . . . . 50 U.S.C. § 1702(a)(1)(B) (Supp. 1980).

Although the United States argues that the plain language of IEEPA authorizes the President to nullify attachments, United States Statement of Interest, filed Feb. 26, 1981, in the district courts ("Statement of Interest") at 28-29, this Court has counseled against "literalness of application."[1]

> The concern of the Trading with the Enemy Act is with problems at once complicated and far-

[1] The language of IEEPA would encompass virtually any presidential action taken during a national emergency with respect to property in which a foreign state has an interest. Read literally, the President's authority under IEEPA to "direct and compel . . . any transfer" of property would authorize a directed transfer of property to the Attorney General, a vesting, even though IEEPA was enacted to deny the President authority to vest in peacetime.

> reaching in their repercussions. Instead of a carefully matured enactment, the legislation was a makeshift patchwork. Such legislation strongly counsels against literalness of application. It favors a wise latitude of construction in enforcing its purposes. *Guessefeldt v. McGrath,* 342 U.S. 308, 319 (1952).[2]

This Court has held that TWEA was designed to prevent the transfer of foreign assets in the United States to hostile foreign nations, to secure those assets for the benefit of American creditors, and to provide an equitable method of distributing foreign assets among American creditors. *Zittman v. McGrath,* 341 U.S. 471, 473-74 (1951); *Propper v. Clark,* 337 U.S. 472, 481, 484 (1949); *see Richardson v. Simon,* 560 F.2d 500 (2d Cir. 1977), *appeal dismissed sub nom., Richardson v. Blumenthal,* 435 U.S. 939 (1978); *Nielsen v. Secretary of Treasury,* 424 F.2d 833 (D.C. Cir. 1970). No case has permitted the President to nullify an attachment of foreign assets obtained by an American creditor in order to transfer the attached assets to a foreign state beyond the reach of U.S. judicial process, and thus to deprive the American creditor of any meaningful remedy.

In upholding the President's authority to nullify attachments under IEEPA, the Government and the Courts of Appeals for the First and District of Columbia Circuits rely almost exclusively on *Orvis v. Brownell,* 345 U.S. 183 (1953). The Government finds *Orvis* "particularly com-

[2] *See also Brown v. J.P. Morgan & Co.,* 31 N.Y.S.2d 323, 333-34 (Sup. Ct. 1941), *rev'd on other grounds,* 265 A.D. 631, 40 N.Y.S.2d 229 (1943), *aff'd,* 295 N.Y. 967 (1946):

> While the language of the executive order [issued under TWEA] is broad and savors of an all-inclusive interdiction, nonetheless the range of its application is to be viewed and measured in the light of its obvious intent. . . .

pelling" in confirming the President's authority. Statement of Interest at 34.

In *Orvis*, petitioners obtained an attachment against Japanese assets in a New York State court after the assets had been frozen.[3] Subsequently, the Alien Property Custodian vested the assets. Orvis sued the Custodian under Section 9(a)[4] of TWEA, claiming that the attachment prevailed over the Custodian's power to vest. This Court held that the Custodian could vest the property free of the attachment. *Orvis v. Brownell*, 345 U.S. at 188. It did not hold that frozen assets could be returned to the foreign debtor free of a domestic creditor's attachment; the respective property interests of the U.S. claimant and the enemy debtor were not at issue in *Orvis*. This Court was careful to hold that the freezing order did not disturb "attachment liens insofar as they determined relationships between creditor and enemy debtor . . . ." 345 U.S. at 186-87. *Orvis* holds only that the Custodian's statutory vesting power creates an interest in the assets superior to the attachment creditor, thus ensuring that the assets are applied equitably for the benefit of all U.S. creditors.

The Government's analysis of *Orvis*, and that of the Courts of Appeals for the First and District of Columbia Circuits, *see Charles T. Main International, Inc. v. Khuzestan Water & Power Authority*, No. 80-1027 (1st Cir. May 22, 1981) (typescript opinion) ("*Main*"); *AIG*, mistakenly proceed on the assumption that the power at issue in *Orvis* is the President's freezing power. The freez-

[3] Although a license for the attachment was required, no license was in fact sought, a fact noted by this Court, 345 U.S. at 185, 189, and discussed in Judge Frank's opinion in the court below. *Orvis v. McGrath*, 198 F.2d 708 (2nd Cir. 1952).

[4] Section 9(a) permits a person other than an enemy to recover an interest in property vested by the Custodian. Pet. App. 28a-31a.

ing order in *Orvis* simply prevented a "transfer" of the foreign assets, so that petitioner could not perfect a property interest that would survive vesting. The Court's holding, however, deals primarily with the Custodian's statutory power to vest. The Court upholds the Custodian's title as against the attachment, a title acquired by vesting. *Orvis* does not define the scope of the President's authority absent vesting, the issue before the Court now. The United States argues in this case that IEEPA alone authorizes what in *Orvis* could be accomplished only by vesting.

In *Zittman v. McGrath*, 341 U.S. 446 (1951), the plaintiff-creditors attached blocked deposits of German banks in the United States. The Custodian issued an order by which he sought to vest the "right, title, and interest" of the German banks. "He has, in short, put himself in the shoes of the German banks." 341 U.S. at 463. To obtain the assets free of the attachment lien, the Custodian argued that a post-freezing order attachment was null and void, not only as against the Custodian's power to vest, but as against the German debtor. "[H]e takes the position that no valid rights against the German debtors were acquired by the attachments because prohibited by the freezing program." *Id.* The Custodian in *Zittman* thus took the same position that the United States takes in this case: that a post-freeze attachment does not establish a property interest as against the enemy debtor, Germany in *Zittman* and Iran in this case. This Court rejected that position.

> As against the German debtors, the attachments and the judgments they secure are valid under New York law, and cannot be cancelled or annulled under a vesting Order by which the Custodian takes over only the right, title, and interest

of those debtors in the accounts. 341 U.S. at 463-64.

In this case the United States asks the Court to sanction under IEEPA the cancellation of an attachment that it refused to permit under TWEA.

The Court of Appeals in *AIG* reads *Orvis* and *Zittman* as indicating that this Court "would not give the attachments any effect as against a federal interest", slip op. at 21-22, and therefore concludes that the attachments should not be given effect as against the United States interest in resolving the Iran crisis. No abstract "federal interest", however, was at issue in *Orvis* and *Zittman;* this Court was construing the extent of the Custodian's power to vest, not upholding a foreign policy interest.

3. IEEPA does not authorize the nullification of attachments when no alternative relief is provided.

IEEPA, like TWEA, is intended to protect the interests of U.S. claimants. The resolution of disputed claims against foreign states, through claims settlement arrangements, is a traditional means of protecting these interests. The President has entered into claims settlements with other countries numerous times in the past 200 years, by providing for international arbitration or accepting lump sum payments. *See* Statement of Interest at 12n**, 13n*. It may be reasonable to read into IEEPA implied authority to nullify attachments for claimants remitted to a claims settlement program. Nothing in the language of IEEPA permits this expansion of presidential power, but it reconciles difficult competing interests and provides a solution consistent with past practice and with the statutory purpose of IEEPA.

The United States has emphasized to this Court the importance of access to the Tribunal in defending the President's authority to nullify attachments:

> The First and District of Columbia Circuit opinions also amply sustain the power of the President to settle claims against Iran *by providing for arbitration of those claims.* . . . Hence the President has provided a reasonable and fully adequate means for resolving claims against Iran and, *consistent with the purposes of IEEPA, has assured the presence of funds to pay arbitration awards out of the Iranian assets that were frozen on November 14, 1979.* Memorandum for Respondents in Response on Petition for a Writ of Certiorari Before Judgment at pp. 11-12, *Dames & Moore v. Regan,* No. 80-2078 (emphasis added). *See also* Statement of Interest at 28.

Similarly, in distinguishing the Iranian cases from *Zittman,* the D.C. Circuit in *AIG* said:

> United States policy is perfectly consistent: it seeks to resolve a difficult foreign crisis and safeguards certain legitimate claims of Americans not by, as in *Zittman,* denying a forum, but by remitting the claimants to international arbitration. *AIG,* slip op. at 21.

Whatever the merits of the court's reasoning in that case, which did not involve claims that were not arbitrable, *AIG,* slip op. at 13 n.4, it does not apply to excluded claimants, who have not been remitted to international arbitration.

The nullification of attachments obviously has far different consequences for claimants who are excluded from

the Tribunal than it does for claimants who are not. If the President's actions are sustained, it is at least arguable that for claimants who have access to the Iran-U.S. Claims Tribunal the statutory purposes of IEEPA are met. Claimants who are excluded from the Tribunal will have no practical means to enforce a judgment against Iran. They will have neither the benefits secured by their prior attachments nor access to the Tribunal. The effect of the President's actions with respect to these claimants is contrary to the statutory purposes of TWEA and IEEPA.

4. The Foreign Sovereign Immunities Act denies to the President authority to nullify attachments obtained pursuant thereto.

The President's nullification of attachments also contravenes the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611. Pet. App. at 35a, 38a. ABII's writ of attachment, for example, was issued under local law, D.C. Code Ann. § 16-501 (1973), but jurisdiction for the attachment is conferred by FSIA. That Act vests in the courts the responsibility for determining when private claims may be asserted against foreign states and when attachments may issue against the assets of foreign states to secure judgments. 28 U.S.C. § 1602. Pet. App. at 38a.

The legislative history shows clearly that Congress wanted issues of immunity – under what circumstances U.S. claimants could sue foreign states and enforce judgments – decided on statutory, legal grounds, not on the basis of foreign policy considerations.

> A principle purpose of this bill is to transfer the determination of sovereign immunity from the executive branch to the judicial branch, thereby reducing the foreign policy implications of immunity determinations and assuring

> litigants that these often crucial decisions are made on purely legal grounds and under procedures that insure due process. H.R. Rep. No. 1487, 94th Cong., 2nd Sess. 7, *reprinted in* [1976] U.S. Code Cong. & Ad. News 6604, 6606 ("FSIA House Report").

Congress likewise provided American claimants with an effective means for enforcing commercial claims by authorizing execution upon foreign assets:

> [T]he bill would remedy, in part, the present predicament of a plaintiff who has obtained a judgment against a foreign state. Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. [FSIA] seeks to restrict this broad immunity from execution. It would conform the execution immunity rules more closely to the jurisdiction immunity rules. FSIA House Report at 8.

The legislative history of FSIA also reveals Congress' intent that claimants would not be denied an enforceable remedy against foreign governments by a subsequent executive agreement. Sections 1604 and 1609 of FSIA make jurisdiction over claims against foreign sovereigns subject to "*existing* international agreements to which the United States [was] a party at the time of enactment . . . ." (Emphasis added.) An earlier version would have extended this exemption to "future" agreements. The House rejected this extension on the ground that it was "best to eliminate any possible question that this language might be construed to authorize a future international agreement"

denying American claimants a remedy against foreign governments. FSIA House Report at 10.

In light of FSIA, the Executive Branch can no longer argue, as it does, Statement of Interest at 17, that all foreign claims are contingent and may be cancelled by the President in furtherance of political objectives. *See Youngstown Sheet & Tube Co. v. Sawyer,* 343 U.S. 579,637-38 (1952) (Jackson, J., concurring). The President's nullification of attachments contravenes the requirement of FSIA that commercial claimants be accorded statutory and judicially determined remedies against aforeign government, free from political interference.

Construed properly, IEEPA is not inconsistent with FSIA. Freezing foreign assets pursuant to IEEPA does not itself conflict with FSIA because it effects no permanent disposition of foreign assets. What offends against FSIA is not a freeze designed to preserve the status quo but a scheme designed to immunize foreign assets from the remedies provided by FSIA, a scheme implemented in this case by nullifying attachments and directing the return of attached property to Iran. Construed to permit such immunization, FSIA and IEEPA would be inconsistent. Repeal by implication is not favored. *See, e.g., Silver v. New York Stock Exchange,* 373 U.S. 341, 357 (1963); *Posadas v. National City Bank,* 296 U.S. 497, 503 (1936).

B. The Hostage Release Act Does Not Authorize The President To Nullify Attachments.

The Hostage Release Act of 1868, 22 U.S.C. § 1732 (1979), does not provide independent statutory authority for the nullification of attachments. This statute has been held to authorize the use of presidential "diplomatic" and "foreign-service consular" powers. *Worthy v. Herter,* 270

F.2d 905, 910 (D.C. Cir.), *cert.denied,* 361 U.S. 918 (1959). *See generally Zemel v. Rusk,* 381 U.S. 1 (1965) (refusal to validate passport); *Agee v. Muskie,* 629 F.2d 80 (D.C. Cir.), *cert. granted,* 101 S. Ct. 69 (1980) (passport revocation); *Redpath v. Kissinger,* 415 F.Supp. 566 (W.D. Tex.), *aff'd* 545 F.2d 167 (5th Cir. 1976) (imposition of a travel ban). Judge McGowan's separate opinion in *AIG* holds that the Act authorizes the suspension of U.S. claims against a foreign government, but does not reach the question whether it also authorizes the nullification of attachments.

Congress enacted the Hostage Release Act to address the involuntary repatriation of naturalized American citizens visiting Europe, and British arrests of Americans for alleged complicity in the Fenian cause in Ireland. 46 Cong. Globe, 40th Cong., 2d Sess. 1796, 4207, 4211-4212, 4232 (1868). *See AIG* (Mikva, J., separate slip op. at 1). Congress used broad language to assure the President of congressional support in resolving those two crises, not to give the President plenary authority to resolve any dispute involving "any violation of the rights of American citizenship."

We agree with Judge Mikva that the "Act is too dangerous a reed to provide independent support for actions whose consequences are primarily domestic." (Mikva, J., separate slip op. at 3.)

C. The President Lacks Inherent Constitutional Authority To Nullify Attachments Without Providing An Alternative Remedy.

The United States relies on the President's authority to enter into international claims settlement programs as authority for the nullification of attachments. Statement of Interest at 26. Whatever may be the force of that argument as to claimants who are included in a claims pro-

gram, it is clearly inapplicable to claimants who are not. The President does not have inherent authority to nullify attachments and leave excluded claimants with no alternative remedy against Iran.

Neither the First Circuit in *Main* nor the District of Columbia Circuit in *AIG* addressed the President's inherent authority to nullify attachments, since both Courts of Appeals believed that the President had statutory authority to act. They did, however, consider the President's inherent authority to suspend claims.[5] Both Circuits regarded the availability of binding arbitration as essential in upholding the President's inherent authority to suspend and ultimately terminate claims against Iran. *Main*, slip op. at 22; *AIG*, slip op. at 25.

United States v. Belmont, 301 U.S. 324 (1937), and *United States v. Pink*, 315 U.S. 203 (1942), the primary cases on which the United States relies in its Statement of Interest, do not support its position. In neither case were claims of U.S. nationals at stake. *Belmont* holds only that the President may constitutionally give effect to Soviet decrees confiscating the property of Soviet citizens. In *Pink*, the New York Superintendent of Insurance wanted to use funds deposited by the New York branch of a Russian insurance company to discharge claims against the insurance company arising abroad and held by foreign claimants. The United States asserted the right to apply the funds to its general claims against the Soviet Union and the general claims of U.S. nationals. This Court held:

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[5]Both Courts of Appeals rejected the position of the concurring judge in *Main* that IEEPA authorized the suspension of claims. *AIG*, slip op. at 26 n.15; *Main*, slip op. at 13-14 & n.13; *cf. Main*, slip op. at 1 (Breyer, J., concurring).

> [T]he Federal Government is not barred by the Fifth Amendment from securing for itself and our nationals priority against such [foreign] creditors. 315 U.S. at 228.

In foreign affairs, the Executive and Legislative Branches share responsibility. The President's historic dominance over foreign affairs has been the product of congressional restraint.[6] Prior to the enactment of FSIA, it was at least arguable that the President had plenary authority to deal with claims asserted in U.S. courts against foreign states, and attachments obtained therein. Acting through suggestions of immunity, the President could defeat the effort of a U.S. claimant to obtain jurisdiction or to enforce a judgment.[7] As noted, enactment of FSIA placed in the courts, rather than the President, responsibility for determining under what conditions foreign states may be sued in U.S. courts, and their property attached. The President may no longer claim inherent authority to nullify ABII's attachment. *See Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. at 636-37 (Jackson, J., concurring).

The United States argues that nullification of attachments "was an essential part of the agreement" with

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[6]One constitutional scholar has noted:

> The courts, we have seen, have recognized the authority of the President to direct them in regard to sovereign and diplomatic immunity, some thought also in Act of State, subjects which are also proper subjects for Congressional legislation.

L. Henkin, Foreign Affairs and the Constitution 104 (1972).

[7]*See, e.g., Victory Transport Inc. v. Comisaria General*, 336 F.2d 354 (2d Cir. 1964), *cert. denied*, 381 U.S. 934 (1965); *Rich v. Naviera Vacuba, S.A.*, 197 F. Supp. 710 (E.D. Va.), *aff'd* 295 F.2d 24 (4th Cir. 1961).

Iran. Whether or not that is so, it is insufficient in law. An executive agreement, no matter how essential, cannot override constitutional rights or create presidential power. *Reid v. Covert,* 354 U.S. 1 (1957); *Seery v. United States,* 127 F.Supp. 601 (Ct. Cl. 1955); *United States v. Guy W. Capps, Inc.* 204 F.2d 655 (4th Cir. 1953), *aff'd on other grounds,* 348 U.S. 296 (1955).

II. THE NULLIFICATION OF THE ATTACHMENTS OF EXCLUDED CLAIMANTS CONSTITUTES A TAKING IN VIOLATION OF THE FIFTH AMENDMENT.

For two hundred years, the courts have recognized a right to compensation when property is taken or sacrificed to achieve U.S. foreign policy objectives. In *Ware v. Hylton,* 3 U.S. (3 Dall.) 199 (1796), a Virginia statute provided that debts owed by Virginia citizens to British creditors could be discharged by payment to the State. A subsequent Peace Treaty with Great Britain reaffirmed debts to British creditors, causing plaintiff to pay the debt twice. The Court held that plaintiff was entitled to seek compensation from the State.

> That congress had the power to sacrifice the rights and interests of private citizens, to secure the safety or prosperity of the public, I have no doubt; but . . . *ample compensation ought to be made to all the debtors who have been injured by the treaty, for the benefit of the public. Id.* at 245 (emphasis added).

Similarly, in *United States v. The Schooner Peggy,* 5 U.S. (1 Cranch) 103 (1801), the Court affirmed the power of the

President to restore through treaty a prize ship that had been captured by the officers of an American ship. Nevertheless, the Court stated that this might be a "case proper for compensation." 5 U.S. (1 Cranch) at 110. *See also Blagge v. Balch,* 162 U.S. 439, 455 (1891), *citing Gray v. United States,* 21 Ct. Cl. 343, 392-393 (1886).

The President's order annulling the attachments of excluded claimants is an unlawful taking for Fifth Amendment purposes because, first, the attachment constitutes a property interest that was taken, and, second, such claimants do not presently have a reasonably certain prospect of obtaining compensation.

A. The Attachments Are A Property Interest.

The courts have consistently held that an attachment is a property interest within the meaning of the Fifth Amendment. *See Armstrong v. United States,* 364 U.S. 40, 46 (1960) (government action defeating the plaintiffs' materialmen's liens constitutes a taking under the Fifth Amendment); *Louisville Joint Stock Land Bank v. Radford,* 295 U.S. 555 (1935) (mortgage lien held a property right compensable under the Fifth Amendment). *See also In re Hoops,* 3 B.R. 635, 640 (D. Colo. 1980) ("A lien is a substantive property right for purposes of the Fifth Amendment"). Nevertheless the Court of Appeals in *AIG* held that the President's annulment of the attachments on Iranian property was not a taking because the general license permitting attachments was revocable (like all licenses issued under the Iranian Asset Control Regulations),[8] and thus claimants had no "reasonable expecta-

[8] §535.805 of the Regulations provides:

> The provisions of this part and any rulings, licenses, authorizations, instructions, orders or forms issued thereunder may be amended, modified, or revoked at any time.

tion" that the attachments would remain in force. *AIG, slip op.* at 38.

The D.C. Circuit holding may be appropriate where the holder of the attachment can satisfy his claim in another forum, such as the Iran-U.S. Claims Tribunal. However, for excluded claimants, the nullification of their interests leaves them with nothing.

A licensed attachment of frozen assets may create a property interest even though the Executive retains the power to revoke the license. In both *Orvis* and *Zittman,* the licenses were revocable. Nevertheless, this Court held in both cases that the freeze did not nullify claimant's property interests in the assets vis-a-vis the foreign creditor. *Orvis v. Brownell,* 345 U.S. at 186; *Zittman v. McGrath,* 341 U.S. at 456.

As this Court has noted many times, property interests for Fifth Amendment purposes "are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law — rules or understandings that secure certain benefits and that support claims of entitlements to those benefits." *Board of Regents v. Roth,* 408 U.S. 564, 577 (1972); *see Arnett v. Kennedy,* 416 U.S. 134 (1974); *Perry v. Sindermann,* 408 U.S. 593 (1972). Whether a property interest is protectable under the Fifth Amendment requires an examination not only of the interest purportedly given by the state, but of the mutual understandings, that have been created upon which reasonable reliance may be placed. In *Perry,* the Court held that a faculty member at a state university could reasonably rely upon an unwritten, "common law" understanding that his employment would continue so long as his services were satisfactory. "A person's interest in a benefit is a 'property' interest for due

process purposes if there are such . . . mutually explicit understandings that support his claim of entitlement to the benefit. . . ." 408 U.S. at 601.

Although *Roth* and *Perry* concerned procedural due process rights, their analyses are relevant to the question of how property interests are created. That the license issued by the Secretary of the Treasury authorizing prejudgment attachments was revocable is the beginning, not the end, of the inquiry.

When the President, citing his authority under IEEPA, authorized prejudgment attachments, he did so in the expectation that creditors would undertake the expense and inconvenience to obtain them for some purpose. The FSIA, IEEPA, the prior experience of international settlements, and the decisions of this Court all gave content to the President's actions and inevitably and designedly created expectations that claimants' access to Iranian funds would be assured.[9] Read together these authorities held out the promise that commercial claims would either be adjudicated in accordance with the rule of law or be resolved through a claims settlement procedure.

The argument of the Court of Appeals in *AIG*, slip op. at 38-39, that no expectations were created by the attachment license, proves too much. The license invited claimants to act upon it; it was issued with the intention and expectation that attachments would be sought. Yet under the Court of Appeals' reasoning, a claimant under-

[9]The President reinforced those expectations by his public statements assuring claimants that their claims would be satisfied from the frozen Iranian funds. Pet. App. 109a, 111a-112a.

taking the expense of obtaining an attachment would reasonably do so without any expectation of benefits.[10]

The Government, Statement of Interest at 38, and the *AIG* Court, slip op. at 38-39, likened the President's nullification of the attachment license to the revocation of property licenses issued by the Government. *See, e.g., United States v. Fuller,* 409 U.S. 488 (1973). This comparison misses the point. *First,* when the Government revokes a license to use land, it does not require the licensee to surrender whatever of value it has obtained; revocation merely interrupts future use. In this case, the President's revocation destroys whatever value the attachment had.

Second, the attachment license is different from the licenses at issue in the grazing and mineral cases. In those cases, the land was owned by the Government from which all rights of access or use devolved. The rights of claimants to attach assets arises from an independent source – state law – and is guaranteed by FSIA. Although the President's license was necessary because he had frozen all Iranian assets, the authority for the attachments was not predicated upon federal power, but upon local law. The President has no authority to issue or to authorize the is-

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[10]In its Statement of Interest filed with the district court, the United States argues that the annulment of the attachment license causes no loss because "the President's actions restored all claimants to their status quo as of November 14, 1979 . . . ." Statement of Interest at 39. The Government reasons that without the freeze, Iran would have withdrawn its assets leaving claimants unable to obtain attachments. Although this argument may tell against some claimants, it does not apply to ABII. ABII attached Iran's remainder interest in the Foreign Military Sales Fund, disposition of which is governed by the Arms Export Control Act, 22 U.S.C. § 2751 (1979). Iran did not have possession or control of this fund on November 14, 1979, and it does not have possession or control today.

suance of writs of attachment; such writs are issued by courts acting under state law. Thus, when the President nullified the attachments, he was acting not simply upon a license that he was authorized to revoke. He was also destroying an interest that derives from an independent body of law. Claimants thus had every reason to expect that the President would not interfere with their right to recovery, an expectation that, under the circumstances, created a compensable property interest.

B. The Nullification Of Attachments Of Excluded Claimants Constitutes An Unlawful Taking.

Because the attachments created a property interest in the Iranian assets, the Government's annulment constitutes a taking. Under the Fifth Amendment the taking is unlawful because excluded claimants have no reasonable prospect for compensation.[11]

A Fifth Amendment taking is unlawful and must be barred unless there is a "reasonable, certain and adequate provision for obtaining compensation." *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 125 (1974), *quoting Cherokee Nation v. Southern Kansas R.R. Co.*, 135 U.S. 641, 659 (1890). The United States anticipates this problem in its Statement of Interest; its answer is that claimants can look to the "establishment of the Iran-U.S. Claims Tribunal", the Tribunal's one billion dollar security account, Iran's obligation to replenish the account, and "the enforceability of the Tribunal's awards in

[11]A taking of a property interest compensable under the Fifth Amendment is complete when the Government destroys the value of the property. *E.g.*, *Armstrong v. United States*, 364 U.S. 40, 48 (1960).

the courts of any nation". Statement of Interest at 20.[12] Access to the Tribunal is adequate compensation for the nullification of attachments, but, obviously, only for claimants before the Tribunal. For excluded claimants, the taking of their attachments will remain uncompensated.

The Government speculates that new Iranian assets "may well" come into this country "based on renewed trade" and be available for attachment. *Id.*, at 39. This hardly rises to a "reasonable, certain and adequate" prospect of compensation. It is also unlikely; the prospect that any new funds will be attached will itself be a strong deterrent against bringing them into the United States.

It is unlikely that excluded claimants can obtain relief in the Court of Claims. 28 U.S.C. § 1502 denies the Court of Claims jurisdiction of "any claim against the United States growing out of or dependent upon any treaty entered into with foreign nations."[13] The United States does not concede that a claim for compensation will be within the jurisdiction of the Court of Claims. Statement of Interest at 21 n.*, *citing* 28 U.S.C. § 1502.

This Court can, of course, moot the Fifth Amendment objection by holding that the Court of Claims will have jurisdiction to hear claims. But that deter-

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[12]Ironically, the Claims Settlement Declaration, which makes Tribunal awards enforceable in the courts of any nations, may create obstacles for those excluded claimants who seek to enforce abroad judgments obtained in U.S. courts. A foreign court might, for example, decline to recognize a U.S. court judgment on the ground that the Declaration deprived the U.S. courts of jurisdiction over Iranian claims.

[13]International executive agreements have been considered "treaties" for purposes of 28 U.S.C. § 1502. *Hughes Aircraft Co. v. United States*, 534 F.2d 889, 903 (Ct. Cl. 1976).

mination must be made now, not at some future time. This Court has consistently ruled that when a taking is imminent, the availability *vel non* of a Tucker Act remedy must be ascertained. *See, e.g., Regional Rail Reorganization Act Cases*, 419 U.S. at 124-25 (holding that availability of Tucker Act remedy must be ascertained in order to assure adequate compensation for any taking); *Cities Service Co. v. McGrath*, 342 U.S. 330, 335 (1952).

The Courts of Appeals in *Main*, slip op. at 23, and *AIG*, slip op. at 38, held that it was premature to consider whether the President's suspension of claims constitutes a taking. That holding may be correct with respect to the suspension of claims, because the district courts can always consider the taking question when they are called upon later to dismiss the claims. The nullification of an attachment, however, is final because there will be nothing left to attach in the future. The issue must therefore be considered now.

The Court of Appeals in *AIG* attempted to distinguish the *Rail Reorganization Act Cases* on the ground that future losses under the Rail Reorganization Act were certain, while future losses for plaintiffs in *AIG* were speculative. *AIG, slip op.* at 38-40. We disagree with the Court's analysis, but in any event, this Court's decision in *Cities Service*, is directly in point. Cities Service issued negotiable bearer debenture bonds, some of which had been negotiated to enemy holders abroad. Because the Alien Property Custodian could not reach the debentures, he vested the obligation and ordered Cities Service to pay over the value of the bonds. Cities Service argued that the vesting order was an unlawful taking because it might be liable in the future to a holder in due course who obtained a foreign court judgment and levied on overseas assets of Cities Service. The Court noted that it was "improbable,"

that Cities Service would be exposed to double liability, but it held that Cities Service could recoup any double payment from the United States.

> [O]nly with this assurance against double liability can it fairly be said that the present seizure is not itself an unconstitutional taking of petitioner's property. 342 U.S. at 336.

Under the authority of *Cities Service,* excluded claimants must be assured now of access to the Court of Claims. Failing that, the nullification of their attachments is an uncompensated taking.

Respectfully submitted,

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